A **KUWAIT FINANCE HOUSE (MALAYSIA) BHD**

v.

MESSRS MOHAMED RIDZA & CO

B HIGH COURT MALAYA, KUALA LUMPUR
LEE HENG CHEONG JC
[WRIT NO: 22NCVC-57-01-2013]
28 AUGUST 2013

C ***LEGAL PROFESSION:*** *Retainer - Duties to client - Whether implied term that solicitor should exercise care, skill and diligence to protect client's legal right - Whether breach of contractual duty - Whether solicitors could shift liability to client for failure to comment on draft security documents - Whether client suffered losses due to solicitor's negligence*

D ***TORT:*** *Negligence - Professional negligence - Duty of care - Solicitor stated wrong amount in corporate guarantee - Whether negligent - Whether damages could be claimed*

The plaintiff retained the defendants as its solicitors to prepare its E financing documentation for a banking facility offered to Aquamarine Industries Sdn Bhd ('Aquamarine'). The facility was secured, *inter alia*, by: (i) RM45,000,000 corporate guarantee by the corporate guarantors; and (ii) RM45,000,000 joint and several guarantee by individual guarantors. As a result of defaults by F Aquamarine, the plaintiff proceeded with legal action against Aquamarine and the individual guarantors and obtained default judgments against them for RM36,216,061.16 being the amount outstanding. The plaintiff also obtained default judgments against the corporate guarantors for RM25,550,000 as partial judgment G sum due to the defendant's negligent mistatement in the corporate guarantee. The plaintiff issued a letter to the defendant and sought written explanation as to why the defendant had stated the liability of the corporate guarantors under the corporate guarantee as RM25,550,000 instead of RM45,000,000 but there H was no positive response from the defendant. The plaintiff claimed that it had lost its opportunity to recover the full judgment sum from the corporate guarantors and suffered loss and damage in the sum of RM10,666,061.16 being the difference in value between the actual amount outstanding and the judgment sum. The plaintiff I contended that their loss and damage arose from the defendant's

negligence and breach of contractual duty for the failure to demonstrate professional competency in preparing the financing documentation for the banking facility granted by the plaintiff to Aquamarine. In defence, the defendant argued that it was not negligent as the draft of the security documents were reviewed, commented and approved by the plaintiff. Thus, even if the defendant was found to be negligent, the plaintiff was also guilty of contributory negligence for failing to keep track of the documentation prepared by the defendant. The defendant further contended that even if it had wrongly stated the limit in the corporate guarantee, the plaintiff had not suffered any loss as the corporate guarantors had not paid any amount towards the judgment sum and the judgment sum remained unsatisfied to date. The issues for determination *inter alia* were: (i) whether the defendant was negligent when it stated that the liability of the guarantors under the corporate guarantees was RM25,550,000; (ii) whether it was an implied term that the defendant's retainer as the solicitor for the plaintiff would exercise care, skill and diligence to protect the plaintiff's legal right; (iii) whether the defendant breached their contractual duty towards the plaintiff; and (iii) whether the plaintiff had suffered losses as a result of the defendant's negligence.

Held (allowing plaintiff's claim with costs):

(1) Even though it was part of the plaintiff's relevant officer's function to check the draft documents, the defendant, as the plaintiff's solicitors could not seek to shift liability for negligence by shifting the error committed to the plaintiff. Although the plaintiff had not commented on the draft corporate guarantee that stated the sum of RM25,550,000 as the guaranteed sum, the plaintiff was entitled to assume that the defendant as the plaintiff's appointed solicitor had a duty to the plaintiff to prepare the relevant financing documents properly, skilfully and professionally. Thus, the defendant had breached their duty towards the plaintiff as the defendant was negligent when it stated the liability of the corporate guarantors under the corporate guarantee was RM25,550,000. (paras 28-32)

(2) It was clear that it was an implied term of the defendant's retainer as the plaintiff's solicitors that the defendant would exercise all reasonable care, skill and diligence and demonstrate

professional competence in attending to the plaintiff's requirement and protecting the plaintiff's legal interest in preparing the necessary financing documentation for Aquamarine's facilities. Therefore, the defendant, as the appointed solicitors to the plaintiff, had breached its contractual duty by stating the liability of the corporate guarantors under the corporate guarantee as RM25,550,000. (paras 46, 47 & 52)

(3) When the plaintiff made a claim in tort which involved a claim for damages, it was for the plaintiff to prove the actual damage suffered. As at the date of judgment, the plaintiff had not suffered any actual loss which arose from the defendant's negligence as the plaintiff had not recovered any money pursuant to the judgment sum. Even if the corporate guarantee did state the correct limit of RM45,000,000 the plaintiff could not still recover a single cent. Therefore, the plaintiff could only claim nominal damages even though the corporate guarantee was defective. Thus, nominal damages in the sum of RM1,000,000 was awarded to the plaintiff. (paras 57, 62 & 64)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 HC ***(foll)***

Lim Pang Loong & Anor v. University of East London [2013] 5 CLJ 285 HC ***(refd)***

Pegasus Management Holdings SCA and Another v. Ernst & Young and another [2010] EWCA Civ 181 ***(refd)***

Penang Port Commission v. Kanawangi Seperumaniam (No. 1) [1997] 1 CLJ 423 CA ***(refd)***

Saamah Saruan v. Norhisham Tahir & Ors [2010] 1 LNS 1595 HC ***(foll)***

Tan Sri Datuk Ibrahim Mohamed v. Leong Tuck Onn & Anor [2012] 6 CLJ 662 HC ***(foll)***

Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal [2009] 3 CLJ 751 CA ***(foll)***

For the plaintiff - Tan Gian Chung (Yap Chiu Wan & Kong Chia Yee with him); M/s Shook Lin & Bok

For the defendant - Lim Kian Leong (Veronica Eleenia Ong & Goh Gin Jhen with him); M/s Lim Kian Leong & Co

Reported by Sandra Gabriel

JUDGMENT

Lee Heng Cheong JC:

Introduction

[1] The plaintiff offered banking facilities to Aquamarine Industries Sdn Bhd ("Aquamarine") amounting to RM45,000,000, *vide* a letter of offer dated 15 August 2009, which were to be secured by, *inter alia*:

(a) A RM45,000,000 corporate guarantee by the corporate guarantors: and

(b) A RM45,000,000 joint and several guarantee by Tan Boon Suan, Ong Lian Oeu, Tan Thean Chooi and Tan Ching Yong (collectively "the individual guarantors"),

[2] The plaintiff then issued a letter dated 11 September 2007 to the defendant, informing the defendant, of the approval of the RM45,000,000 banking facilities as stated in the said letter of offer and retained the defendant as the plaintiff's solicitors to prepare the necessary financing documentations for the said banking facilities granted by the plaintiff to Aquamarine.

[3] The defendant's Sharifah Shafika Bt Alsagoff (DW1) emailed Raja Arni Binti Raja Aris (PW1), drafts of all the material financing documents, including the corporate guarantee.

[4] As a result of defaults by Aquamarine, the plaintiff proceeded with legal action against Aquamarine and the individual guarantors and obtained default judgments against them, for RM36,216,061.16 ("the full judgment sum"), being the amount outstanding under the facilities as at 31 October 2011.

[5] The plaintiff also obtained default judgments against the corporate guarantors for RM25,550,000 ("the partial judgment sum") because the limit of the corporate guarantors' liability under the corporate guarantee was stated to be RM25,550,000 only.

[6] The plaintiff further obtained winding up orders against Aquamarine and the corporate guarantors.

[7] The plaintiff then issued a letter to the defendant to seek a written explanation as to why the defendant had stated the liability of the corporate guarantors under the corporate guarantee as RM25,550,000, instead of RM45,000,000.

[8] As there was no positive response from the defendant, the plaintiff then commenced this action herein against the defendant.

Statement Of Agreed Facts

[9] At all material times, the defendant was a firm of solicitors practising at Unit 50-10-9, Level 10, Wisma UOA Damansara, Damansara Heights, 50490 Kuala Lumpur.

[10] The plaintiff *vide* a letter dated 11 September 2007 to the defendant ("the Letter of Instructions"), retained the defendant as the plaintiff's solicitors to prepare the necessary financing documentation for the RM5,000,000 Murabahah Tawarruq Asset Financing-I facility ("MT 1 facility"), RM10,000,000 Murabahah Tawarruq Asset Financing-I facility ("MT 2 facility") and RM30,000,000 Murabahah Tawarruq Asset Financing-I facility ("MT 3 facility") granted by the plaintiff to Aquamarine Industries Sdn Bhd.

[11] A copy of the plaintiff's letter of offer dated 15 August 2007 ("letter of offer") was enclosed with the letter of instructions. The defendant *vide* their letter dated 13 December 2007 to the plaintiff, *inter alia* enclosed the followings:

(a) The original stamped letter of offer; and

(b) Certified true copies of the resolution of the board of directors of AMI Marketing Sdn Bhd and Eastern Global Sdn Bhd both dated 15 August 2007 and the resolution of the board of directors of Sekinchan Marine Products Sdn Bhd dated 14 September 2007 authorising the provision of a joint and several corporate guarantee to the extent of RM45,000,000; enclosed a corporate guarantee dated 12 December 2007 ("Corporate Guarantee") and confirmed that the same had been duly executed by the corporate guarantors.

[12] The defendant is in receipt of the plaintiff's letter dated 31 January 2012 requesting for a written explanation from the defendant as to why the defendant stated the liability of the corporate guarantors under the corporate guarantee as RM25,550,000.

[13] The plaintiff *vide* their letter dated 31 January 2013, informed the defendant that the plaintiff obtained judgment against the corporate guarantors in the sum of RM25,550,000.

The Plaintiff's Case

[14] The plaintiff's case in respect of its writ action herein against the defendant for loss and damage in the sum of RM10,666,061.16, interest thereon as well as general damages and interest thereon. The plaintiff contends that their said loss and damage arose from the defendant's negligence and/or breach of the defendant's contractual duty to *inter alia*, exercise reasonable care, skill, diligence and demonstrate professional competence in preparing the financing documentation for the said banking facilities granted by the plaintiff to Aquamarine.

[15] In essence the plaintiff's contention is that the defendant, as the plaintiff's solicitors had committed a "negligent misstatement' in the said corporate guarantee by stating the limit therein, to be RM25,550,000, resulting in the plaintiff, losing the opportunity of recovering the full judgment sum from the corporate guarantors and allegedly suffered loss and damage in the sum of RM10,666,061.16, being the difference in value between the actual amount outstanding and the judgment sum based on a corporate guarantee for RM25,550,000.

The Defence

[16] The defendant's defences are as follows:

(a) That it was not negligent as at all material times, all the draft financing documents which the plaintiff had instructed the defendant to draft, were reviewed, commented and approved upon by the plaintiff.

(b) Further, if the defendant was found to be negligent, the plaintiff is guilty of contributory negligence by failing to keep track of the documentation prepared by the defendant.

(c) Moreover, the defendant contends that even if it did wrongly state the limit in the corporate guarantee to be RM25.55 million (which is denied) the plaintiff has not suffered any loss there from as the corporate guarantors have not paid one sen towards the judgment sum and it matters not whether the judgment sum is for RM25.55 million or RM36 Million as both will inevitably remain substantially unsatisfied.

[17] The Statement Of Agreed Issues To Be Tried

(a) Whether the plaintiff had instructed the defendant to state the limit of the corporate guarantors' liability under the corporate guarantee as RM25,550,000?

(b) Whether the corporate guarantors had authorised the provision of a joint and several corporate guarantee to the extent of RM45,000,000 to the plaintiff?

(c) Whether the defendant had misstated the liability of the corporate guarantors under the guarantee as RM25,550,000 instead of RM45,000,000?

(d) Whether the defendant was negligent in stating the liability of the guarantors under the corporate guarantees as RM25,550,000?

(e) Whether it was an implied term of the defendant's retainer as the plaintiff's solicitors that the defendant would exercise all reasonable care, skill and diligence and demonstrate professional competence in attending to the plaintiff's requirements and protecting the plaintiff's legal interests in preparing the necessary financing documentation for Aquamarine's facilities?

(f) Whether the defendant breached their contractual duty to the plaintiff in stating the liability of the corporate guarantors under the corporate guarantee as RM25,550,000?

(g) Whether the plaintiff suffered any loss and damage as a result of the stating of that the corporate guarantors under the corporate guarantee as RM25,550,000?

(h) Whether the plaintiff's loss of the shortfall sum arose from the defendant's negligence?

Consideration Of The Agreed Issues

Agreed Issue (a): Whether The Plaintiff Had Instructed The Defendant To State The Limit Of The Corporate Guarantors' Liability Under The Corporate Guarantee As RM25,550,000?

[18] I find that the plaintiff did not instruct the defendant to state the limit of the corporate limit of the corporate guarantee as RM25,550,000.

[19] DW1's testimony under cross-examination at pp. 126-128 of NOP states as follows: A

Mr. G C Tan: Would you agree with me that the figures dated at page 510 of this bundle, page of the document paginated as page 9 and 10 of Bundle B, under section 3, the guaranteed sums, would you agree with me that the figure stated here of RM25.55 million is not the figure that appears in the letter of offer which we had looked at earlier? If you need to refer to the letter of offer it is in bundle A at page 5. B C

DW1: Yes.

Mr. G C Tan: In fact the figure of RM25.55 million doesn't appear anywhere in the letter of offer dated 15.8.2007. Is that right? D

DW1: Yes.

Mr. G C Tan: So, is it correct to say that the amount of RM25.55 million stated at page 510 in the draft corporate guarantee is an error? E

DW1: I do not agree to that.

Mr. G C Tan: If you do not agree to that Puan Shafika, can you tell me whether you received any instructions from the plaintiff to prepare a corporate guarantee with a limit of RM25.55 million? F

DW1: I don't know, not to my knowledge.

Mr. G C Tan: Did the Defendant receive any request from the corporate guarantors that the limit of their guarantee is stated as RM25.55 million? G

DW1: Not that I know of. H

[20] DW1's testimony under cross-examination (p. 132 of NOP) further states as follows:

Mr. G C Tan: But do you agree with me that there is no mention of RM25.55 million in the letter of offer? Yes? I

DW1: Yes.

[21] The corporate guarantors' resolutions at pp. 2, 3 and 25 of Bundle A state the limit of the said corporate guarantee as RM45,000,000 and not RM25,550,000.

[22] DW1's testimony under cross-examination (pp. 130-131 of NOP) states as follows:

> Mr. G C Tan: So Puan Shafika, isn't it true that in the light of these 3 resolutions of the corporate guarantors and in the light of resolutions of the customer Aquamarine, the amount stated at page 9 of the draft corporate guarantee seen at page 510 of bundle B is not the correct amount that was to have been prepared by the Defendant. Do you agree?
>
> DW1: It would appear so.

[23] Thus I find that it is clear from the above that the plaintiff did not instruct the defendant to state the limit of the corporate limit of the corporate guarantee as RM25,550,000.

Agreed Issue (b): Whether The Corporate Guarantors Had Authorised The Provision Of A Joint And Several Corporate Guarantee To The Extent Of RM45,000,000 To The Plaintiff?

[24] I find that the corporate guarantors had authorised the provision of a joint and several corporate guarantee to the extent of RM45,000,000 to the plaintiff and this evidenced by the certified true copies of the resolution of the board of directors of AMI Marketing Sdn Bhd and Eastern Global Sdn Bhd both dated 15 August 2007 and the resolution of the board of directors of Sekinchan Marine Products Sdn Bhd dated 14 September 2007 authorising the provision of a joint and several corporate guarantee to the extent of RM45,000,000.

Agreed Issue (c): Whether The Defendant Had Misstated The Liability Of The Corporate Guarantors Under The Guarantee As RM25,550,000 Instead Of RM45,000,000?

[25] In the light of my findings in agreed issues (a) and (b) above, I find that the defendant had misstated the liability of the corporate guarantors under the corporate guarantee as RM25,550,000 instead of RM45,000,000.

Agreed Issue (d): Whether The Defendant Was Negligent In Stating The Liability Of The Guarantors Under The Corporate Guarantees As RM25,550,000?

[26] The defendant contends that it was not negligent as at all material times as all the draft of the security documents which the plaintiff had instructed the defendant to draft, were reviewed, commented and approved upon by the plaintiff. Further, if the defendant was found to be negligent, the plaintiff is guilty of contributory negligence by failing to keep track of the documentation prepared by the defendant.

[27] It is important to note that from the testimony of PW1, Raja Arni, who testified that when the first draft of the corporate guarantee was sent to the plaintiff's Raja Arni (PW1) by DW1, Shafika, the amount stipulated in the corporate guarantee is RM25,550,000. This showed that the defendant was already negligent at the very beginning of the preparation of the security documents.

[28] Even though it is part of the plaintiff's relevant officers' functions to check these draft documents, this court finds that the defendant cannot shift their duty as the plaintiff's solicitors to the plaintiff even though the officer in overall charge, PW1, Raja Arni herself, did not review the draft security documents sent to them.

[29] Even though there was no comments from the plaintiff, on the draft corporate guarantee that stated the sum of RM25,550,000 as the guaranteed sum, this court finds that the plaintiff is entitled to assume that the defendant as the plaintiff's appointed solicitor has a duty to the plaintiff, to prepare the relevant financing documents properly, skilfully and professionally instead of inserting the wrong limit of the said corporate guarantee, even in the defendant's first draft of the corporate guarantee.

[30] PW1 stated that the relevant emails exchanges are merely on structure and facility agreement and even though the plaintiff's other officers, namely Lenny Wan and Che Zarina have reviewed the corporate guarantee and had no issues with the RM25,550,000 limit. This court is of the view that the plaintiff's non-comments, did not relieve the defendant, of the duty to prepare the said corporate guarantee, properly, skilfully and professionally.

[31] This court finds that the plaintiff is entitled to rely on the defendant, to ensure that the contents of the letter of instruction are followed strictly subject to such other instruction whether written and/or oral to the contrary. The defendant cannot sought to shift liability for the negligence, by shifting the error committed by the defendant to the plaintiff.

[32] Thus I find that the defendant did not take reasonable care to prepare the said corporate guarantee, properly, skilfully and professionally and thus breached their duty to the plaintiff. Thus I find that the defendant was negligent in stating the liability of the corporate guarantors under the corporate guarantee as RM25,550,000.

[33] In *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585 at p. 600; [2003] 1 MLJ 567 at p. 578, Gopal Sri Ram JCA (as he then was) held:

> to make out a case against a defendant in the tort of negligence, a plaintiff must show that he was owed a duty by the defendant to take reasonable care. Second, that the defendant breached that duty, third, that the resultant breach caused the harm in question and fourth, that he (the plaintiff) suffered damage that is not too remote.

[34] This court notes that DW1 had admitted under cross-examination that the defendant owed the plaintiff a duty to ensure that the plaintiff's interests were protected when the defendant drafted the relevant financing documents.

Mr. G C Tan:

Mr. G C Tan: I put it to you also Puan Shafika that the defendant did owed such a duty to ensure that the interests of the plaintiff were protected when you drafted the financing documents for the plaintiff. Do you agree?

DW1: Interest. Sorry, can you repeat?

Mr. G C Tan: I put it to you that the Defendant did owed the Plaintiff a duty to ensure that the plaintiff's interests were protected when the defendant drafted the financing documents. Do you agree?

DW1: Yes.

[35] This court finds that the defendant as the plaintiff's appointed solicitor in the preparation of financing documentation solicitors, owes a duty to the plaintiff both in tort and contract to exercise care and skill on which the defendant knew that the plaintiff would totally rely. Further, the defendant has a duty not to injure the plaintiff and must do what the defendant had undertaken to do, and which the plaintiff had relied on them to do, which was to prepare the necessary financing documentation in accordance with the terms of the letter of offer, in a proper, skilful and professional manner. This court find that the defendant has breached their contractual and tortious duty to the plaintiff.

[36] In *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1)* [1984] 1 CLJ 353; [1984] 1 CLJ (Rep) 251 at p. 261; [1984] 2 MLJ 39 at p. 45, the Federal Court held *inter alia* as follows:

> The liability of a solicitor may be viewed in two aspects. At common law, the retainer imposes upon him an obligation to be skilful and careful and for failure to fulfill this obligation, he may be made liable in contract or negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort (see Halsbury's *Laws of England* (3rd Ed) p. 96, page 13). He owes a duty not to injure his client by failing to do that which he had undertaken to do and which his client has relied on him to do.

[37] In *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 at p. 460, the court held *inter alia* as follows:

> Under the general law the relationship of solicitor and client gave rise to a duty as a solicitor to exercise that care and skill on which he knew his client would rely, and to a duty not to injure his client by failing to do that which he had undertaken to do and which, at the solicitor's invitation, the client had relied on him to do.

[38] This court notes that the limit of the corporate guarantors' liability was stated as RM45,000,000 in the said letter of offer and in the said board of directors' resolutions of the corporate guarantors themselves. However, the limit of the corporate guarantors' liability was stated to be RM25,550,000 in the corporate guarantee prepared by the defendant notwithstanding no instruction to the contrary. As the defendant's client, this court finds that it is perfectly reasonable and justified that the plaintiff

ought to be able to rely on and expect the defendant to follow the terms of the letter of offer, and prepare the corporate guarantee with the corporate guarantors' limit being RM45,000,000, in accordance with the said letter of offer even though drafts of the said pricing documents including the said corporate guarantee were sent to the plaintiff for review and comments.

[39] In *Saamah Saruan v. Norhisham Tahir & Ors* [2010] 1 LNS 1595; [2011] 3 AMR 251 at p. 260, the court held *inter alia*:

> A duty of care is breached by failing to do that which one has undertaken to do or that which one has been relied upon to do.

[40] Thus this court finds that the defendant's act in the misstatement of the limit of the corporate guarantors' liability in the corporate guarantee, a breach of the defendant's duty to be skilful and careful and to use proper care, skill and professionalism in preparing the corporate guarantee.

[41] This court finds that the defendant, in exercising proper care, skill and professionalism in the preparation of the financing documents for RM45,000,000 facilities, ought to have asked the plaintiff whether they had any comments on all the other related financing documents, and not just only the master facility agreement.

[42] Further DW1 admitted under cross-examination that the defendant did not specifically ask the plaintiff for comments on the draft corporate guarantee. Instead, the defendant sent the draft financing documents including the corporate guarantee with the expectation that the plaintiff would check the same without communicating the defendant's said expectation to the plaintiff.

[43] DW1 had also admitted under cross-examination that the defendant did not expressly ask the plaintiff whether they had any comments on the other financing documents apart from the master facility agreement.

[44] Thus this court also finds that the defendant's error in misstating the limit of the said corporate guarantee even in the first draft of the corporate guarantee clearly showed that the defendant was negligent as that error was never rectified by the defendant even when the said corporate guarantee was printed for execution.

[45] Thus this court finds that the defendant was negligent in stating the liability of the guarantors under the corporate guarantee as RM25,550,000.

Agreed Issue (e): Whether It Was An Implied Term Of The Defendant's Retainer As The Plaintiff's Solicitors That The Defendant Would Exercise All Reasonable Care, Skill And Diligence And Demonstrate Professional Competence In Attending To The Plaintiff's Requirements And Protecting The Plaintiff's Legal Interests In Preparing The Necessary Financing Documentation For Aquamarine's Facilities?

[46] In the light of my findings in agreed issue (a), (b), (c), (d) above and (f) hereinafter appearing, I find that it was an implied term of the defendant's retainer as the plaintiff's solicitors that the defendant would exercise all reasonable care, skill and diligence and demonstrate professional competence in attending to the plaintiff's requirements and protecting the plaintiff's legal interests in preparing the necessary financing documentation for Aquamarine's facilities.

Agreed Issue (f): Whether The Defendant Breached Their Contractual Duty To The Plaintiff In Stating The Liability Of The Corporate Guarantors Under The Corporate Guarantee As RM25,550,000?

[47] Based on the reasons stated in my findings in respect of agreed issues (a) to (e) and hereinafter appearing, I find that the defendant breached their contractual duty as the appointed solicitor to the plaintiff in stating the liability of the corporate guarantors under the corporate guarantee as RM25,550,000.

[48] In *Wong Kiong Hung & Anor v. Chang Siew Lan & Another Appeal* [2009] 3 CLJ 751 at p. 762; [2009] 4 AMR 64 at p. 74, the court held *inter alia* that to establish a breach of contractual duty against the solicitor, the client must prove:

(1) the existence of a contractual relationship which expressly or impliedly imposes a contractual duty on the solicitor;

(2) there is a breach thereof by the solicitor;

(3) the client has thereby suffered damage;

(4) the damage is not too remote a consequence of the breach.

[49] In *Saamah Saruan v. Norhisham Tahir & Ors* [2010] 1 LNS 1595; [2011] 3 AMR 251 at p. 258, the court held *inter alia* that:

> It is however my understanding that by the law in this country, contracts for services do contain an implied promise to exercise reasonable care (and skill) in the performance of the relevant services.
>
> ... The principle of implied terms being read into any contract is well accepted in our courts, and for it to be applicable certain conditions must be fulfilled ...
>
> In the circumstances of this case, the contract between the plaintiffs and the first and fourth defendants is one of performance of services by professionals who have described themselves as "consulting civil and structural engineers". Any persons declaring themselves to be such must be reasonably and equitably expected to take reasonable care and skill in the performance of their craft. If this is not the case, why then would a layman engage and pay a price for their services? This term of expected reasonable care and skill is so obvious in the first defendant's appointment that the court finds it to come within the ambit of "it goes without saying".

[50] In *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 at p. 463, it was held that:

> The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer, when given, puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest, and carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep the client informed to such an extent as may be reasonably necessary according to the same criteria. In all these aspects, however, the tie between the two is contractual.

[51] In *Tan Sri Datuk Ibrahim Mohamed v. Leong Tuck Onn & Anor* [2012] 6 CLJ 662 at p. 664, the court held *inter alia* that:

> where the solicitor is in breach of his contractual duty to his client, or where he fails to use proper care and as a result his client suffers loss, he is liable in damages even if the claim in

negligence was purely for financial loss. In this case, there was a breach of duty by the Defendants and as a result, the Plaintiff suffered loss and damages.

[52] Applying the principles laid down on the above cases, this court finds that it is clear that it is an implied term of the defendant's retainer as the plaintiff's solicitors that the defendant would exercise all reasonable care, skill and diligence and demonstrate professional competence in attending to the plaintiff's requirements and protecting the plaintiff's legal interests in preparing the necessary financing documentation for Aquamarine's facilities. This court further finds that the defendant is in breach of the said contractual duty to the plaintiff.

Agreed Issue (g): Whether The Plaintiff Suffered Any Loss And Damage As A Result Of The Stating Of That The Corporate Guarantors Under The Corporate Guarantee As RM25,550,000?; And

Agreed Issue (h): Whether The Plaintiff's Loss Of The Shortfall Sum Arose From The Defendant's Negligence?

[53] The defendant contends that even if it did wrongly state the limit in the corporate guarantee to be RM25.55 million (which is denied), the plaintiff has not suffered any loss there from as the corporate guarantors have not paid one cent towards the judgment sum and it matters not whether the judgment sum is for RM25,550,000 or RM36,000,000 as both remain unsatisfied to date.

[54] It is the plaintiff's case that on the 21 December 2011 the plaintiff obtained a judgement against AISB and the individual guarantors in the sum of RM36,216,061.16 being the full amount outstanding under the facilities as at 31 October 2011 and that the plaintiff was only enter judgment, in the sum of RM25,550,000 only against the corporate guarantors as the limit of the corporate guarantor's liability under the corporate guarantee was stated to be RM25,550,000.

[55] According to PW2-Peter Soo, the plaintiff was informed by their solicitors, M/s Lee Ong & Kandiah, the solicitors acting for the plaintiff in the recovery action against AISB and its guarantors that the limit of the liability was stated as RM25,550,000. He further testified that due to the misstatement of the liability of the corporate guarantors in their guarantee, the plaintiff could only obtain judgements against the corporate guarantors for the sum of RM25,550,000.

[56] It is also trite law that when a plaintiff who makes a claim in tort which would necessarily involve a claim for damages, it is the duty of the claimant to prove the actual damage suffered. In *Pegasus Management Holdings SCA and Another v. Ernst & Young and another* [2010] EWCA Civ 181, the court held *inter alia* as follows:

> So far as concerns the claims in tort, proof of damage is an essential ingredient. The critical question raised by the preliminary issue was whether E&Y could show that the claimants had suffered actual damage before 10 November 1999, and in particular, by 2 April 1998, that being the date by which, if any such damage had been suffered, it must have been suffered.

[57] In the present case, the plaintiff's witness PW2 who was in charge of the recovery process was not able to say if the plaintiff could recover any sums from AISB, the individual guarantors or the corporate guarantors towards satisfaction of the respective judgment debts. In fact the plaintiff's witnesses admitted that until the date of the trial, the plaintiff has not recovered even one sen from AISB, nor the individual guarantors nor the corporate guarantors.

[58] It is also trite that the plaintiff must proved that loss must be shown to have actually occurred and also be recoverable in law before the award of damages can be made. The case of *Penang Port Commission v. Kanawangi Seperumaniam (No. 1)* [1997] 1 CLJ 423; [1996] 3 MLJ 427 held *inter alia* as follows:

> To entitle a claimant to damages, it must be shown that he suffered loss, that that loss was caused by the breach of duty alleged, and that the loss was foreseeable, all of which must be proven by the claimant upon whom the burden rests: *Allied Maples Group Ltd v. Simmons & Simmons* [1995] 4 All ER 907.

[59] The plaintiff herein *via* Kuala Lumpur High Court Suit No: 22A-1174-11-2011 sued AISB, and the individual guarantors for RM36 million and obtained judgment. In the same suit the plaintiff also sued the corporate guarantors for RM25,550,000 and obtained judgment against the corporate guarantors for RM25,550,000.

[60] There is no dispute that despite obtaining the said judgments and winding up orders, not a single sen to date has been paid towards settlement of the respective judgments of the said Suit No: 22A-1174-11-2011.

[61] I find that that the plaintiff was unable to prove any losses accrued under the facilities were due to alleged misstatement by defendant in the said corporate guarantee.

[62] Thus I find *inter alia* that as at the date of this judgment, the plaintiff did not suffer any actual losses which arose from the defendant's negligence as the plaintiff to date was unsuccessful in recovering a single cent pursuant to the said corporate guarantee. Even if the said corporate guarantee did in fact state the correct limit of RM45,000,000, the plaintiff could still not be able to recover any single cent as in the present case. In the premises, I hold that the plaintiff can only claim for nominal damages even though the corporate guarantee is defective.

Order

[63] In the light of my above findings, I find that the plaintiff has proved its case against the defendant on a balance of probabilities. On the issue of the quantum of nominal damages to be awarded, this court is guided by the case of *Lim Pang Loong & Anor v. University of East London* [2013] 5 CLJ 285 at p. 299; [2013] 1 LNS 68 at p. 19, where Judicial Commissioner Siti Khadijah binti Hassan Badjenid had stated that:

> If the plaintiffs had proven to the court that their rights had been infringed and judgment were in their favour, in the circumstances of this case I would grant the plaintiffs nominal damages of RM1 million on the grounds that they have failed to prove its amount.

[64] In the light of the circumstances of this case and my above findings, I grant an order in terms of the plaintiff's statement of claim together with costs. I am awarding nominal damages in the sum of RM1,000,000 in favour of the plaintiff.